Supreme Court, U.S.
FILED
MAY 15 2009
OFFICE OF THE CLERK

Nos. 07-984 and 07-990

In the Supreme Court of the United States

COEUR ALASKA, INC., PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

STATE OF ALASKA, PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE FEDERAL RESPONDENTS SUPPORTING PETITIONERS

ELENA KAGAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

By order dated May 4, 2009, the Court directed the parties to file supplemental briefs addressing the following questions:

1. If the discharge of the slurry into the lake would violate Section 301 or Section 306 of the Clean Water Act, would that future violation authorize a court to set aside the permits issued by the United States Army Corps of Engineers and the Record of Decision issued by the United States Forest Service, as "not in accordance with law," 5 U.S.C. § 706(2)(A)? See *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 646 (1990).

2. If a discharge comes within the scope of the Environmental Protection Agency's effluent limitations and satisfies the definition of fill material, may the discharger obtain permits under both Section 402 and Section 404 of the Clean Water Act? Must the discharger do so?

TABLE OF CONTENTS

Page

1. If this Court holds that the proposed discharge would violate Section 301 or 306, that violation would authorize a court to set aside the permits issued by the Corps but not the ROD issued by the Forest Service 3
2. If a discharge is subject to an EPA effluent limitation and also falls within the agencies' definition of the term "fill material," the discharger may not obtain permits under both Sections 402 and 404 of the CWA 11

Conclusion 17

TABLE OF AUTHORITIES

Cases:

FCC v. *NextWave Personal Commc'ns Inc.*, 537 U.S. 293 (2003) 7

PBGC v. *LTV Corp.*, 496 U.S. 633 (1990) 2, 4, 5, 10

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 706(2)(A) ... 2, 4, 6

Clean Water Act, 33 U.S.C. 1251:

33 U.S.C. 1251(a) 6

33 U.S.C. 1311 (§ 301) 2, 3, 5, 7, 10, 15

33 U.S.C. 1316 (§ 306) ..... *passim*

33 U.S.C. 1317 (§ 307) 5, 7, 15

33 U.S.C. 1319 8

33 U.S.C. 1342 (§ 402) ..... *passim*

33 U.S.C. 1342(a) 12, 13

33 U.S.C. 1342(a)(1) 4

33 U.S.C. 1343 (§ 403) 7, 15

33 U.S.C. 1344 (§ 404) ..... *passim*

Statutes and regulations—Continued: Page

33 U.S.C. 1344(a) 3, 13
33 U.S.C. 1344(b)(1) 3, 5, 6
33 U.S.C. 1344(c) 13
33 U.S.C. 1344(p) (§ 404(p)) 7, 15
33 U.S.C. 1365 8
Employee Retirement Income Security Act of 1974, § 4047, 29 U.S.C. 1347 4
Organic Administration Act of 1897, ch. 2, 30 Stat. 34-36 9
16 U.S.C. 478 10
16 U.S.C. 551 9
33 C.F.R.:
Section 320.4 3
Section 320.4(a) 5
Section 320.4(d) 6
36 C.F.R.:
Section 228.1 10
Sections 228.1 *et seq.* 10
Section 228.4 10
Section 228.8 10
40 C.F.R.:
Section 122.3(b) 13
Section 125.4(d) (1973) 13
Section 230.10 ..... 3, 6
Section 230.10(a)(4)-(5) 6
Section 230.10(b)(2) 5
Section 440.104(b)(1) 16

Miscellaneous: Page

51 Fed. Reg. 8871 (1986) 13
65 Fed. Reg. 21,299 (2000) 15
67 Fed. Reg. 31,135 (2002) 13

In the Supreme Court of the United States

No. 07-984

COEUR ALASKA, INC., PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

No. 07-990

STATE OF ALASKA, PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE FEDERAL RESPONDENTS SUPPORTING PETITIONERS

As explained in our prior briefs in this case, the considered position of both the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) is that new-source performance standards adopted by EPA pursuant to Section 306 of the Clean Water Act (CWA), 33 U.S.C. 1316, do not apply to the proposed tailings slurry discharge that is at issue in this case. That is because (a) the proposed discharge involves "fill material" for which Section 404 of the CWA,

BEST AVAILABLE COPY

33 U.S.C. 1344, establishes the applicable permitting scheme; and (b) neither Section 404 nor the regulations implementing that provision require compliance with effluent limitations promulgated under Section 301 (33 U.S.C. 1311) or 306. Both of the questions posed in the Court's May 4 order, however, assume that Section 306 standards *do* apply to the proposed discharge at issue here. Accordingly, the government's responses in this brief are based on that premise.

As to Question 1, a court would have authority to set aside the Section 404 permits at issue here if the Court were to hold that the proposed discharge would violate Section 301 or Section 306. A Corps permit authorizing a discharge that would violate the CWA is an agency action "not in accordance with law." 5 U.S.C. 706(2)(A). That is because the Corps, before deciding whether to issue a Section 404 permit, must consider all applicable CWA provisions and other federal laws bearing on the potential environmental consequences of a proposed discharge. A court would not, however, have authority to set aside the United States Forest Service (Forest Service) Record of Decision (ROD), which does not purport to reflect the Forest Service's application of the CWA to the proposed discharge, but rather approves activities based on independent criteria.

This Court's analysis in *PBGC* v. *LTV Corp.*, 496 U.S. 633 (1990) (*LTV*), is consistent with both of these outcomes. Because the Corps can reasonably be charged with considering all applicable CWA requirements when issuing a Section 404 permit, its failure to consider a permitting criterion that this Court ultimately holds to be applicable would render its permitting decision unlawful. By contrast, because the Forest Service acts pursuant to its own regulatory requirements independ-

ent of the CWA, neither its own failure to consider Section 306 nor any error the Corps may have committed during the Section 404 permitting process would warrant invalidation of its ROD.

As to Question 2, a discharger may not obtain permits under both Sections 402 and 404 of the CWA (33 U.S.C. 1342, 1344) for the same discharge—a point that all parties have agreed upon throughout the course of this litigation. The CWA makes clear that a discharge of fill material may be permitted only under Section 404, not under the mutually exclusive permitting regime of Section 402. Accordingly, if this Court holds that EPA effluent limitations apply to discharges of fill material, the CWA would require that the Section 404 permitting process take account of those limitations—notwithstanding the practical problems that this result would create.

1. **If This Court Holds That The Proposed Discharge Would Violate Section 301 Or 306, That Violation Would Authorize A Court To Set Aside The Permits Issued By The Corps But Not The ROD Issued By The Forest Service**

a. As set forth in our merits briefs (Gov't Br. 18-21; Gov't Reply Br. 4-8), Section 404 provides that the Corps "may issue permits * * * for the discharge of dredged or fill material" when certain conditions—principally contained in Corps regulations (33 C.F.R. 320.4) and the Section 404(b)(1) Guidelines (40 C.F.R. 230.10), which make no mention of Section 306 standards—are satisfied. 33 U.S.C. 1344(a). Section 402 governs the permitting of discharges of *other* pollutants by providing that, "*[e]xcept as provided in section[]* * * * *[404]*, the Administrator [of EPA] may * * * issue a permit for the discharge of any pollutant," pursu-

ant to Section 402's own set of requirements, including those in Section 306. 33 U.S.C. 1342(a)(1) (emphasis added). The CWA thus makes clear that the specific Section 404 permitting regime, rather than the more general Section 402 permitting regime, is to be used in regulating discharges of dredged or fill material. That division, long accepted by the Corps and EPA, reflects Congress's determination that the two types of discharges should be treated differently in light of their different impacts. See Gov't Br. 19-21, 26-28; Gov't Reply Br. 4, 11-19.

The Court's first question nonetheless assumes that Section 306 effluent limitations apply here and that the proposed tailings discharge would violate those limitations. On that assumption, the Section 404 permits issued by the Corps in this case would have authorized a discharge that violates the CWA. Such permits are "not in accordance with law" (5 U.S.C. 706(2)(A)): indeed, they would run afoul of the very Act the Corps is charged with administering. A court therefore would have authority to set aside the permits.

This Court's decision in *LTV* does not support a different result. In that case, the Second Circuit held that the Pension Benefit Guaranty Corporation (PBGC) had acted in an arbitrary and capricious manner by restoring certain pension plans under Section 4047 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1347, without considering policies reflected in bankruptcy and labor law in addition to ERISA itself. 496 U.S. at 645. This Court reversed. The Court held that, in light of the PBGC's "specific and unambiguous" mandate under ERISA, which directed the PBGC to make decisions consistent with its duties under ERISA and did not require decisions that further

the "public interest" generally, the PBCG's focus on ERISA alone (and not bankruptcy and labor law) was not arbitrary or capricious. *Id.* at 646. The Court explained that agency action should not be set aside simply because the agency had failed "to take explicit account of public policies that derive from federal statutes other than the agency's enabling Act." *Ibid.* The Court observed in that regard that a particular agency may have no expertise in other fields and may be "ill equipped to undertake the difficult task of discerning and applying the 'policies and goals' of those fields." *Ibid.*

Unlike in *LTV*, the Court's question here assumes an actual CWA violation, not simply an agency failure to consider the "policies and goals" that underlie a statute. See *LTV*, 496 U.S. at 645 ("The Court of Appeals did not hold that PBGC's decision *actually conflicted* with any provision in the bankruptcy or labor laws."). Moreover, while the PBGC did not have any obligation to consider the "public interest," see *id.* at 646, the Corps must do so when evaluating permit applications. 33 C.F.R. 320.4(a).

Most significantly, Sections 301 and 306 of the CWA are part and parcel of the very Act under which the Corps issues its Section 404 permitting decisions. Sections 301 and 306 are not provisions of a different statutory regime, let alone of an entirely different field of law, as was the case in *LTV*. See 496 U.S. at 646. Pursuant to its Section 404(b)(1) Guidelines (40 C.F.R. 230.10(b)(2)), for example, the Corps already must determine whether a proposed discharge of fill material would comply with Section 307 toxic effluent limitations. Although the government has argued that the effluent limitations of Sections 301 and 306 are designed to be technology-based standards directed toward discharges

of pollutants other than fill material, the policies behind these Sections sound in protection of the Nation's waters. See 33 U.S.C. 1251(a). The Corps shares in the mission of protecting those waters. The concerns animating the *LTV* decision therefore are not present here.

Although Congress's decision to establish a separate permitting regime for dredged and fill material reflects the distinct concerns implicated by such discharges, the Corps must also consider impacts on water quality in making its permitting decisions. See Gov't Br. 20-21. In particular, the Corps' own regulations require it to evaluate permit applications "for compliance with *applicable* effluent limitations and water quality standards." 33 C.F.R. 320.4(d) (emphasis added). Additionally, the prefatory language of the Section 404(b)(1) Guidelines states that "other laws" may preclude a Section 404 permit. 40 C.F.R. 230.10. That language does not suggest that new-source performance standards issued by EPA pursuant to Section 306 actually apply to discharges of dredged or fill material. See Gov't Reply Br. 8-9. The Guidelines contemplate, however, that the Corps will sometimes take account of statutes other than the CWA itself (*e.g.*, the Endangered Species Act) in determining whether and on what conditions to permit a proposed discharge. See 40 C.F.R. 230.10(a)(4)-(5). Because any Section 404 determination must be consistent with those other environmental laws, the Corps is accustomed to looking beyond its own enabling statutes in determining whether Section 404 permits should be issued. As the Court has held, the Administrative Procedure Act, 5 U.S.C. 706(2)(A), requires an agency to comply not only with the laws it is charged with administering but any law that "circumscribes [the agency's] permissible

action." *FCC* v. *NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 300, 304 (2003).

This is not to say that the Corps, in deciding whether to issue a Section 404 permit for a proposed discharge of fill material, must consider *every* possible legal objection to the permit applicant's proposed course of conduct. The Corps would not, for example, seek to determine whether the applicant could be expected to conduct the filling operation in compliance with applicable minimum-wage and other employment laws. And if the recipient of a Section 404 permit were later found to have violated such laws in carrying out the filling activities, that determination would provide no basis for declaring the Corps' permitting decision to be unlawful. But while the Corps in reviewing Section 404 permit applications does not purport to assess the applicant's compliance with all applicable provisions of law, it does broadly consider the anticipated *environmental* consequences of the proposed discharge.

The contrary conclusion—that a Corps Section 404 permit could not be set aside even if the discharge that it authorized was found to violate Section 306—would have anomalous consequences. Although a Section 404 permittee whose discharges comply with the terms of its permit is deemed to be in compliance with Sections 301, 307, and 403 of the CWA, see 33 U.S.C. 1344(p), and is thus immune from any enforcement action based on alleged violations of those provisions, that immunity does not extend to alleged violations of Section 306. See Gov't Br. 22 n.5; Gov't Reply Br. 9-10. If the permit were not subject to invalidation for failure to incorporate Section 306 standards that this Court had held to apply to dischargers of fill material, then a discharger could be subject to a citizen suit or an EPA enforcement action—and

be in violation of the CWA—despite having received and complied with a valid CWA permit. See 33 U.S.C. 1319, 1365. That would be contrary to the purpose of the Act's immunity provisions, which is to protect the reliance interests of dischargers who seek and obtain CWA permits from the appropriate agency and conform their conduct to the terms of the permit.

In a related vein, if this Court were to hold that Section 306 performance standards apply to discharges of fill material, but that the Corps need not consider those standards in determining whether Section 404 permits should be issued, the Court's decision would create a significant gap in the permitting regime. As we explain in Part 2, *infra*, EPA lacks authority to issue Section 402 permits for discharges of fill material. If the Corps in administering the Section 404 program declined to consider performance standards that this Court had held to apply to fill discharges, then *no* federal agency would be in a position to determine whether a particular proposed fill discharge complies with an applicable CWA requirement. The existence of such a gap would be fundamentally at odds with the basic design of the Act, which establishes CWA permits as the principal mode of compliance in order to ensure that the legality of a proposed discharge is assessed *before* the discharge occurs.

b. Even accepting the premise of the Court's question, however, a court would not be authorized to set aside the Forest Service ROD. The ROD does not purport to authorize the proposed fill discharges into the Lower Slate Lake impoundment, but rather makes the Forest Service's approval contingent on the issuance of Section 404 permits by the Corps. The ROD also authorizes actions independent of the proposed discharges based on criteria outside the CWA. Thus, any invalidity

of the Section 404 permits arising from the hypothetical applicability of Section 306 standards would not render the ROD invalid.

The Forest Service approved a plan of operations submitted by the mining companies for activities associated with the Kensington mine project that fall under Forest Service jurisdiction (*i.e.*, on National Forest System lands). J.A. 207a-248a; see Gov't Br. 6-9 & n.3. Based on the Forest Service's analysis of the environmental impact statements, Forest Plan guidelines, and other sources of law, the ROD selects an alternative (Alternative D) that includes as one component the use of Lower Slate Lake as a tailings storage facility for the proposed discharges. J.A. 211a-212a, 215a-217a, 230a-237a. The ROD makes clear, however, that valid permits must be obtained from other regulatory agencies —including a Section 404 permit from the Corps— before the project can proceed. See J.A. 208a-209a ("Implementation of my decision to select an alternative is subject to the completion of those necessary permit processes by the other federal, state, and local authorities."). The ROD also includes components that authorize other activities, such as the upgrading of access roads and bridges to accommodate mine traffic and the construction of a tunnel to connect the mine with ore-processing facilities. J.A. 213a. The ROD further approves disposal of 40% of the tailings as backfill into abandoned mine workings—an activity that does not require a CWA permit because it does not involve discharges into "waters" protected by the Act. *Ibid.*

Pursuant to its Organic Administration Act of 1897, ch. 2, 30 Stat. 34-36, the Forest Service regulates mining on National Forest System Lands. See 16 U.S.C. 551. Persons entering the forest reserves for the purposes of

prospecting, locating, and developing mineral resources "must comply with the rules and regulations covering such National Forests." 16 U.S.C. 478. Forest Service regulations implementing the Organic Act, found at 36 C.F.R. 228.1 *et seq.*, set forth the rules and procedures "through which use of the surface of National Forest System lands in connection with operations authorized under the United States mining laws * * * shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources." 36 C.F.R. 228.1.

Those regulations address the likely impact of proposed activities on surface resources, based on a variety of criteria. 36 C.F.R. 228.4. Although the regulations also require operators to comply with applicable federal and State water quality standards (36 C.F.R. 228.8), the EPA and the Corps (rather than the Forest Service) possess the expertise and authority to address issues under the CWA. When assessing a mining company's plan of operations and determining whether proposed activities will adversely impact the forest surface, the Forest Service therefore does not (and should not be required to) conduct its own analysis of Sections 301 and 306 to determine whether any proposed discharges into "waters of the United States" would comply with the CWA. Cf. *LTV*, 496 U.S. at 646-647.

Instead, the Forest Service ROD makes clear that Coeur's entitlement to discharge fill material into protected waters within the National Forest System is contingent on the issuance *by the Corps* of Section 404 permits authorizing the discharges. Based on the Forest Service's application of its own regulatory criteria, the ROD authorizes other activities that are necessary to the overall mining operation but that do not require

CWA permits because they do not involve discharges into "waters of the United States." Thus, if this Court were to hold that Section 306 performance standards apply to and prohibit the proposed fill discharges at issue in this case, that holding would render the Corps' Section 404 permit invalid, but it would not cast doubt on the legality of any decision that the Forest Service made or was required to make. Accordingly, even if Section 306 performance standards were held to apply to discharges of fill material, a court would not be authorized to set aside the ROD.

2. If A Discharge Is Subject To An EPA Effluent Limitation And Also Falls Within The Agencies' Definition Of The Term "Fill Material," The Discharger May Not Obtain Permits Under Both Sections 402 And 404 Of The CWA

a. Throughout this litigation, all parties, as well as the courts below, have agreed that the proposed discharge is governed by either Section 402 or Section 404, but not both. See, *e.g.*, SEACC C.A. Br. 24 ("The Act provides that a single discharge will be governed by either section 402 or section 404, but not both."); 07-984 Pet. App. 18a (Court of appeals concludes that "the NPDES program administered by EPA under § 402 is the only appropriate permitting mechanism for discharges subject to an effluent limitation."); SEACC Br. in Opp. 20 ("[O]nly one permitting program is applicable to any given discharge."); Gov't Br. 24 (framing inquiry as "*which* permitting scheme applies"); Coeur Br. 24 ("Section 402 and Section 404 are mutually exclusive permitting schemes."); Alaska Br. 27 ("The exception for Section 404 in Section 402 would be meaningless if EPA could issue a Section 402 permit for a discharge that

meets the criteria of Section 404."); SEACC Br. 21 ("[D]ischarges from sources subject to performance standards must be permitted, if at all, under section 402."). At oral argument before this Court, in response to direct questioning on the issue, respondent SEACC disavowed any argument that a discharger may or must obtain both a Section 402 and a Section 404 permit for the type of discharge at issue in this case. See Oral Arg. Tr. 27, 35-37.

The parties' agreement reflects a sound understanding of the CWA permitting regime. The text and structure of the Act make clear that a discharger may not (and *a fortiori* is not required to) obtain both a Section 402 and a Section 404 permit for a particular discharge.[1] As explained in our merits briefing (Gov't Br. 18-19; Gov't Reply Br. 4-5), Section 402, by its plain terms, is applicable only where Section 404 is not. See 33 U.S.C. 1342(a) ("Except as provided in section [318 and 404], the Administrator may * * * issue a permit for the discharge of any pollutant."). The CWA and its regulatory scheme thus establish two mutually exclusive permitting regimes—as both agencies charged with administering the Act agree. See, *e.g.*, J.A. 83a (Corps/EPA Response to Comments: "If a specific discharge is regulated under Section 402, it would not be regulated under Section 404, and vice versa.").

---

[1] If two distinct substances were discharged from a single point source at different points in time, and one of those substances fell within the regulatory definition of "fill material" while the other did not, the discharger would be required to obtain both a Section 404 and a Section 402 permit. That possibility does not logically suggest, however, that a discharger may or must obtain both types of permits *for a particular discharge*.

b. The remaining question is which permitting regime—Section 402 or Section 404—governs in the situation posited by the Court, where a performance standard issued by EPA pursuant to Section 306 is held to apply to a discharge of fill material. The conclusion that the Section 404 permitting scheme would apply to such a discharge follows from the same statutory argument advanced by the government in its prior briefs in this case. See Gov't Br. 18-19, 22-23; Gov't Reply Br. 4-5. Section 404 governs the discharge of dredged or fill material, and Section 402 governs the discharge of *other* pollutants. Compare 33 U.S.C. 1344(a), with 33 U.S.C. 1342(a). Accordingly, identification of the applicable permitting scheme (and of the appropriate permitting agency) turns solely on whether or not the discharge constitutes a discharge of "dredged or fill material." If it is, the discharge is subject (only) to the Corps' Section 404 permitting regime.[2] If it is not, the discharge is subject (only) to EPA's Section 402 permitting regime. As explained in our prior briefs (Gov't Br. 26-37; Gov't Reply Br. 11-21), that dichotomy is reinforced by long-standing administrative interpretations by the agencies. See, *e.g.*, 40 C.F.R. 125.4(d) (1973) (The following do not require an NPDES permit: * * * Dredged or fill material discharged into navigable waters.") (now codified as amended at 40 C.F.R. 122.3(b)); 51 Fed. Reg. 8871 (1986) ("Discharges listed in the Corps' definition of 'discharge of fill material' * * * remain subject to section 404 even if they occur in association with discharges of wastes meeting the criteria * * * for section 402 discharges."); 67 Fed. Reg. 31,135 (2002) ("EPA has never

[2] As noted in our merits briefing (Gov't Br. 4), EPA retains an important role in the Section 404 permitting process through the potential exercise of its veto power under 33 U.S.C. 1344(c).

sought to regulate fill material under effluent guidelines.").

That mode of analysis would be no less valid if this Court determines that Section 306 performance standards apply to discharges of fill material. As explained above, the determination of which permitting scheme applies (*i.e.*, Section 402 or Section 404) depends entirely on whether the relevant pollutant is "dredged or fill material"—not on whether the discharge may also fall within the scope of an EPA effluent limitation. See Gov't Reply Br. 20 ("Under the plain language of Sections 402 and 404, * * * identification of a discharge as 'fill material' does establish that the Corps rather than the EPA is the appropriate permitting agency."). Under Question 2, therefore, the hypothetical applicability of an EPA effluent limitation does not alter the conclusion that a discharge of fill material must be regulated under Section 404.

For the foregoing reasons, if this Court were to hold that Section 306 performance standards apply to discharges of fill material, the authority and responsibility to determine whether particular proposed fill discharges comply with Section 306 standards would rest with the Corps under Section 404 rather than with EPA under Section 402. Implementation of such a regime, however, would pose significant practical problems. First, the Corps has no experience with Section 306 standards because those standards are developed by EPA and both agencies have consistently viewed them as inapplicable to discharges of fill material. A decision holding those standards to apply to fill discharges would thus impose significant new responsibilities upon the Corps.

Second, even if the Corps concluded that a particular proposed discharge complied with an applicable Section

306 performance standard, and issued a Section 404 permit based on that determination, a discharger who complied with the permit would be subject to potential liability in a citizen suit if a court disagreed with the Corps' conclusion and found that the performance standard was violated. That is because Section 404(p) confers immunity only for enforcement actions premised on violations of Section 301, 307, and 403—not Section 306. 33 U.S.C. 1344(p); see pp. 7-8, *supra*. That anomalous result—whereby a party is subject to liability notwithstanding possession of and compliance with a facially valid CWA permit that was premised on the appropriate agency's consideration of all applicable legal requirements—provides further reason to reject the premise that Section 306 standards apply to fill discharges. See Gov't Br. 22 n.5; Gov't Reply Br. 9-10.

If this Court nevertheless were to hold that EPA effluent limitations apply to discharges of fill material, and therefore must be considered and incorporated by the Corps into Section 404 permits, its decision would alter fundamentally the agencies' existing approach to implementation of the CWA. In that event, the agencies might seek to amend other aspects of the regulatory framework in order to address the anomalies described above. The agencies might reconsider the current regulatory definition of the term "fill material" and, in particular, their previous decision not to adopt an exception for discharges covered by EPA effluent limitations. See 65 Fed. Reg. 21,299 (2000); see also Gov't Reply Br. 19-20.[3] Or they might fashion some process by which the

[3] The principle that permits for discharges of "dredged or fill material" are issued by the Corps under Section 404, while permits for other pollutant discharges are issued by EPA under Section 402, is unambiguously stated in the CWA itself and could not be altered through agen-

Corps consults with the EPA for the purpose of determining the impact on its permitting decision of any relevant EPA effluent limitations. In any event, a decision by this Court holding that Section 306 effluent limitations are applicable to fill discharges would likely trigger significant regulatory changes to the current permitting regime.[4]

---

cy regulations. The agencies' *definitions* of "fill material," however, have changed over time, and the current regulatory definition could be amended.

[4] If this Court holds that Section 306 standards apply to discharges of fill material, its identification of the appropriate permitting agency would not affect the proper disposition of this case. The Section 306 standard at issue provides, in relevant part, that "there shall be *no* discharge of process wastewater to navigable waters from mills that use the froth-flotation process." 40 C.F.R. 440.104(b)(1) (emphasis added). If that standard were deemed applicable to the tailings slurry for which the challenged Section 404 permits were issued, neither the Corps nor EPA would issue a permit for the discharges as currently proposed. Accordingly, rather than decide which permitting regime applies, this Court could simply vacate the Section 404 permits and remand to allow the agencies to make that decision if the Court holds that Section 306 standards apply to discharges of fill material.

CONCLUSION

If the Court holds that discharges of fill material are subject to Section 306 standards, a court could set aside the Section 404 permits issued by the Corps, but not the Forest Service ROD, as "not in accordance with law." A discharger may not obtain both a Section 402 and Section 404 permit for a proposed discharge of fill material; rather, the Corps possesses sole permitting authority under Section 404 even if it must apply an EPA effluent limitation.

Respectfully submitted.

ELENA KAGAN
Solicitor General

MAY 2009